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IN THE

Supreme Court of the United States

No. 694. **October Term, 1931.**

THE UNITED STATES OF AMERICA,
Appellant, (Petitioner),

against

GEORGE OTIS SMITH,
Appellee, (Respondent).

On Certificate From the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEE.

GEORGE WHARTON PEPPER,
Attorney for Appellee.

ERNEST SCOTT,
On the Brief.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	3
Statement of the Case	4
Summary of Appellee's Argument	6
Argument on Behalf of Appellee	8
Conclusion	19
Appendix A (Review of the Decisions of State Courts Dealing With Reconsideration by Legislative Bodies)	21
Appendix B (History and Interpretation of the Senate Rules Dealing With Reconsideration)	37
Appendix C (Senate, Departmental and Presidential Practice in the Light of the Reconsideration Rules of the Senate)	53
Chart Showing Development of Senate Rules on Reconsideration from 1790 to date.	

TABLE OF CASES CITED.

(Cases in Heavy Type Are Discussed and Analyzed, the Rest Are Merely Cited.)

PAGE

Achley's Case, 4 Abbott's Practice Reps. N. Y. 35.... 34
Allen v. Morton, 94 Ark. 405, 127 S. W. 450 (1910).... 25
Atchison, etc. R. R. v. U. S., 284 U. S. 248 (1931)....47, 63
Attorney General v. Oakman, 126 Mich. 717, 86 N. W. 151 (1901) 29
Baker v. Cushman, 127 Mass. 105..... 30
Conger v. Gilmer, 32 Calif. 75 (1867).....25, 30
Crawford v. Gilchrist, 64 Florida 41 (1912)..... 31
In re Fitzgerald, 88 App. Div. Rep. N. Y. 434..... 33
Gardner v. Collector, 6 Wallace 499 (1867).....47, 63
Harrington v. Pardee, 1 Calif. App. 278, 82 Pac. 83 (1905) 25
Justices of Jefferson County v. Clark, 1 T. B. Monroe (Kentucky) 82 (1824)..... 25
Lane v. Commonwealth, 103 Pa. 481 (1883)..... 25
Marbury v. Madison, 1 Cranch 137 (1803)...8, 11, 18, 25, 34
People ex rel. McMahon v. Davis, 284 Ill. 439, 120 N. E. 326 (1918) 26, 31
People v. Mills, 32 Hun. 459..... 30
Reed v. School Committee, 176 Mass. 473..... 30
State v. Barbour, 53 Conn. 76, 22 Atl. 686 (1885)..... 24
State v. Foster, 7 N. J. Law 101 (1823)..... 30
State v. Miller, 62 Ohio State 436, 57 N. E. 227 (1900). 24
State v. Phillips, 79 Maine 506, 10 Atl. 447 (1887).... 24

TABLE OF CASES CITED—Continued.

PAGE

State v. Starr, 78 Conn. 638, 63 Atl. 512 (1906) 24
State v. Tyrrell, 158 Wis. 425, 149 N. W. 280 (1914) .. 24
State ex rel. Attorney-General v. Wadhams, 64 Minn. 318, 67 N. W. 64 (1896) 34
U. S. v. Ballin, 144 U. S. 1 (1891) 13
U. S. v. LeBaron, 19 Howard 73 (1856) 25
Whitney v. VanBuskirk, 40 N. J. Law 463 (1878) 30, 35
Witherspoon v. State, 138 Miss. 310, 103 So. 134 (1925) 27, 30, 31
Wood v. Cutter, 138 Mass. 149 (1884) 30, 31

PRESENT SENATE STANDING RULES CITED.

Senate Rule XXXVIII 15, 16, 37, 39, 40, 41, 42, 48
Senate Rule XXXIX 39, 42, 43

SENATE PRECEDENTS CITED.

Adams, Robert B. 67
Ballantine, Arthur A. 69, 70
Barnes, Joseph K. 45, 62
Bean, John W. 59
Bliss, E. Raymond 60
Board of Mediation 64, 66
Clark, John W. 60
Cobb, James A. 57
Colby, J. C. S. 62
Conant, Harry A. 57
Durkee, Joseph H. 57, 60
Fisk, A. C. 45
Frost, Westley 45, 62
Goddard, John H. 45, 62
Grew, Joseph C. 70

TABLE OF CASES CITED—Continued.

PAGE

Heath, H. H. 62
Hill, Isaac ..... 45.
Interstate Commerce Commission 64, 66
Jeffries, Noah L. 59, 61, 62
Knight, Alva A. 60
Kursheedt, Edwin I. 58, 61
Legate, James F. 59, 61
Ligon, Charles R. 57
Marks, Morris 62
McCarthy, Wilson 68
Mellon, Andrew W. 68, 69
Miles, Laban J. 60
Mills, Ogden L. 69, 70
Nourse, George 58, 60
Plimley, William 61
Pollock, Samuel M. 58
Pritchard, George W. 60
Reconstruction Finance Corporation Board 67, 68
Reeves, Thomas H. 58, 61
Scott, Lewis A. 59
Shannon, Peter C. 60
Shumard, Belle C. 60, 61
Strum, Louie W. 65, 66
Tubbs, William H. 58, 60

RECORDS OF SENATORIAL PROCEEDINGS.

Congressional Record, Vol. 74, Part 2 65
Congressional Record, Vol. 74, Part 3 65
Congressional Record, Vol. 74, Part 4 ..... 63, 64
Congressional Record, Vol. 74, Part 7 65
Congressional Record, Vol. 75 64-70
Senate Executive Journal, Vol. 15, Part 2 47-48

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THE UNITED STATES OF AMERICA,
Appellant, (Petitioner),

against

GEORGE OTIS SMITH,
Appellee, (Respondent).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

OPINION BELOW.

The case came before the Supreme Court of the District of Columbia on a petition for a writ of *quo warranto* filed in the name of the United States by the United States Attorney for the District of Columbia, pursuant to the Code of the District of Columbia, Title 24, Part III, Section 232 thereof, and an answer thereto filed by the appellee. The parties submitted at the argument for the information of the Court a pamphlet entitled "Senate Precedents." This contained a list of precedents relating to the reconsideration by the Senate of votes confirming or rejecting nominations

after notification to the President of its action. The Supreme Court of the District of Columbia in an opinion filed December 5, 1931, denied the petition (R. 11). The opinion is not yet reported. The pamphlet, Senate Precedents, was filed with the opinion (R. 18).

Prior to the entry of the order following the opinion, the parties, by stipulation, submitted additional information concerning Presidential and Senatorial Practice in cases of reconsideration of nominations. This stipulation, dated December 10, 1931, was entitled "Agreement of Counsel in Regard to Facts Concerning Nomination, Confirmation and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," and was made a part of the record of the Court below by an order entered December 14, 1931.

JURISDICTION.

On December 22, 1931, the Supreme Court of the District of Columbia entered an order that the petition for a writ of *quo warranto* be denied with costs to be paid by the petitioner (R. 112). On the same day the appellant in open court noted an appeal to the Court of Appeals (R. 112). On December 29, 1931, the appellant filed its assignment of errors (R. 112) and the designation of the record (R. 114).

On January 22, 1932, the record was filed with the Court of Appeals and the case noted for trial at the January Term. At the same time there was filed with the Court of Appeals a stipulation by both counsel that the Clerk of the Court of Appeals, in printing the record transmitted to him by the Supreme Court, should, in lieu of printing separately the pamphlet, Senate Precedents, made a part of the record of

the Supreme Court by the opinion filed therein on December 5, 1931, and the stipulation of counsel made a part of the record by order of the Supreme Court entered on December 14, 1931, print the pamphlet and stipulation as one document in the form to be prepared and submitted upon agreement to the Clerk of the Court of Appeals by both counsel. This compilation appears in the record now before this Court as "Senate, White House and Departmental Precedents" (R. 31-112).

Subsequently, the Court of Appeals, pursuant to Section 239 of the Judicial Code, certified a question to this Court. On February 11 the certificate was signed and filed in the Court of Appeals. On February 12 a certified copy thereof was filed in this Court, and on February 15 a joint motion to bring up the entire record and a joint motion to advance the cause were made before this Court. These motions were granted on February 23 (R. p. 137).

QUESTION PRESENTED.

This is a proceeding for a writ of *quo warranto* to oust and exclude the appellee from the office of member and chairman of the Federal Power Commission on the ground that the Senate of the United States has at no time advised and consented to the appointment of the appellee to said office.

The sole question presented upon this appeal is one of law, namely, is it, or is it not, within the power of the United States Senate, to annul a presidential appointment by rescinding, within two days of actual executive session, its advice and consent to a nomination after, by order of the Senate, notice of that advice and consent has been sent to the President, and after the President, in reliance thereon, has signed the commission of the nominee, and after the

President has declined to comply with the request of the Senate for the return of the notification?

The Supreme Court of the District of Columbia answered this question in the negative, and denied the petition for a writ of *quo warranto*.

STATEMENT OF THE CASE.

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. The Senate, on December 20, 1930, in open executive session, and by a vote of 38 to 22, advised and consented to the appointment of the appellee to the office for which he had been nominated. On the same day it was ordered by the Senate that this resolution of confirmation be forwarded forthwith to the President. This order was entered late in the evening of Saturday, December 20th, and was executed by the Secretary of the Senate on the morning of Monday, December 22d. Subsequently and on the same day the President signed and, through the Department of State, delivered to the appellee a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. The appellee then on the same date took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider was duly made by a Senator who had voted to confirm and also a motion to request the President to return the resolution of confirmation which had

been passed into his possession. Both motions were duly adopted and the President was notified in due course.

The President, on January 10, 1931, informed the Senate by a message in writing that he had theretofore appointed the appellee to the office in question, after receiving formal notice of confirmation, and he therefore refused to accede to the Senate's request.

Thereafter a motion was made and adopted in the Senate directing the Executive Clerk of the Senate to place on the Executive Calendar for the action of the Senate "The name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the President *pro tem* of the Senate put to the Senate the question of advice and consent to the appointment of the appellee and a majority of the Senators present voted in the negative. Notification of this action was sent to the President.

On the following day, February 5, 1931, the Senate by resolution requested the District Attorney of the District of Columbia to institute in the Court below proceedings in *quo warranto* under the Code of the District to test the appellee's right to hold his office. The District Attorney complied with the request of the Senate and the proceeding was duly instituted as above set forth.

The facts more fully appear in the certificate which was filed by the Court of Appeals with this Court February 12, 1932. This certificate is set out on pages 123-135 of the Record.

SUMMARY OF APPELLEE'S ARGUMENT.

In view of the decision in *Marbury* v. *Madison*, it is settled that where the President has nominated, the Senate has advised and consented, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed. The only point in the present case left open by that decision is whether the Senate may nullify a presidential appointment by subsequent reconsideration proceedings, after notification of confirmation has been sent to the President and after the commission has been issued to the appointee in reliance upon that notification. The appellee urges that when the Senate acted, and notified the President of its action, the legislative branch necessarily parted with its control over the subject-matter which thereupon passed into the hands of the Executive. This left the Senate without power to reverse its action thereafter unless control of the transaction was restored to it by voluntary action of the President.

A study of the provisions of the Senate rules and the history of their development, as well as the practice thereunder, lends strength to this contention. These rules are in harmony with the settled parliamentary principle that there can be no reconsideration by a legislative body which has parted with control of the subject-matter. They indicate that notification sent to the President under them was intended to be a formal declaration of consent on which reliance might be placed. To construe them otherwise would result in interference with the President in the discharge of his constitutional functions,—would recognize interlocutory or conditional consent by the Senate, and would render the

rules invalid and unconstitutional. The contention of the appellee is that constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure, alike, lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, ordered notice of consent to be sent to the President, it once and for all surrendered its control of the matter and its right to reconsideration, and left the Executive free to make a constitutional appointment.

ARGUMENT ON BEHALF OF APPELLEE.

I.

It is at least doubtful whether counsel can make any effective addition to the clear and cogent statement of the appellee's case embodied in the opinion of Justice Peyton Gordon in the Court below. (R. pp. 11-30.)

That opinion is, in outline, as follows:

A. Under *Marbury* v. *Madison* there are three steps in an appointment:

(1) Nomination by the President,

(2) Consent and approval by the Senate, and

(3) Appointment by the President, which is complete as soon as he has signed the commission.

B. When the Senate has finally consented, its decision is irrevocable.

C. If in this case the Senate had not authorized immediate notice to the President of confirmation, the Senate would have retained control of approval of the appointment, and in the meantime any appointment by the President would have been illegal.

D. Even where the Senate parts with control, it may, before the President appoints, regain control if the President acquiesces in the Senate's request for a return of the notification.

E. If the Senate in any case approves and loses control of the matter and the President appoints, he likewise

by the act of appointment loses control and cannot disturb the appointee except by removal.

F. It is not the practice of the Senate to return to the President the papers received from him, but simply to send him a notice of its action confirming or refusing to confirm.

G. The advice and consent of the Senate to a nomination, as contemplated by the Constitution, is not a provisional or a conditional one.

H. The general parliamentary rule is that, as stated in Jefferson's Manual, there can be no reconsideration by the Senate after it has parted with control.

I. There have been no substantial changes in the Senate rules on this subject since 1790.

J. The Senate's own construction of its rules has been that, when it has parted with control, its powers are gone unless it regains control with the consent of the President.

K. Constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure, alike, lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, ordered notice of consent to be sent to the President, it once and for all surrendered its control of the matter and its right to reconsideration, and left the Executive free to make a constitutional appointment.

We do not understand that the first six of the above propositions (A, B, C, D, E and F) are seriously questioned. We believe that the Court's propositions G, H, I, and J are undoubtedly and clearly sound. Since these prop-

ositions are valid, the conclusion stated in proposition K inevitably follows.

II.

The appellant's brief is devoted to a consideration of

(a) the history of the Senate rules,

(b) the Senatorial practice,

(c) the Executive practice, and

(d) decisions of courts in some of the States.

We venture to devote little space in this brief to these points because

(a) the history of the Senate rules serves only to confirm Judge Gordon's construction of them; (See *infra* pp. 38-51).

(b) the Senate practice could in any event do no more than throw light on the Senate's understanding of its own rules, but in fact merely confirms Judge Gordon's interpretation; (See *infra* at pp. 52-71).

(c) the Executive practice is irrelevant to the appellee's legal rights and, in any event, has not been uniform and consistent, but has depended in any given case upon whether the then Executive was influenced more by regard for the appointee's rights or by the desirability of pleasing the Senate; and

(d) most of the decisions relied upon by the appellant were based upon facts in no wise like those of the present case and are clearly not in point; some of them support our view; others (which at first glance seem divergent) on close analysis appear not to be so; and none of the state decisions are authorities of much weight in a case arising

under the Constitution of the United States (See *infra* pp. 22-36).

Some comment on each of the above points will be found in the Appendices to this brief at the pages above indicated.

III.

While the case is of great and far-reaching importance, this brief is short because there are only a few propositions which are really controlling, and their inherent strength is such that they would gain little by great elaboration. The appellee is content to rest his case upon them.

IV.

1. It has never been doubted since *Marbury* v. *Madison*, 1 Cranch 137 (1803), and is conceded now, that where the President has nominated under the Constitution, the Senate has advised and consented to the appointment, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed.

2. The only point in the present case left open by that decision is whether such an appointment becomes void where the Senate, having first ordered immediate notification to the President of its approval and consent, thereafter reconsiders and undertakes to reverse its action.

In that case, Chief Justice Marshall, speaking for the Court said in effect, that the President could not have changed his mind after signing the commission, because, as he held, the President could not thereafter lawfully have forbidden the Secretary of State to deliver the commission (page 171 of opinion). Can the Senate be per-

mitted, as between itself and the President, to change its mind in a way not permitted to the President as between himself and his appointee?

In an attempt to meet the difficulty presented by this question the appellant is driven to argue that the Senate in this case never really consented—that what it did was to give a mere interlocutory consent, which never became final because, within the period for reconsideration permitted by its own rules, the Senate reversed its consent. According to this view it is unimportant whether the President was or was not in fact ignorant of the Senate rules. Whether he knew it or not, the notice of confirmation immediately sent to him was merely for his comfort—to give him the satisfaction of knowing that so far the Senate was sympathetic.

As against any such theory it is submitted that the Senate had consented, that formal notification gave finality to the consent; and that when the President, having received such official notification and in reliance thereon, had made the appointment, the appointee was legally entitled to office until removed according to law.

3. The appellee insists that the proposition last above stated is not only consistent with the provisions of the Senate rules but necessarily follows from a reasonable interpretation of them. In other words, the Senate has not by its rules attempted to embarrass the President or to impede the discharge of his executive duties. For the moment, however, let it be assumed that the Senate has actually attempted by its rules to impose upon the Executive a period of inaction following receipt by him of notice of confirmation, the duration of the period of inaction being determined solely by the pleasure of the Senate as ex-

pressed in its rule. It is earnestly contended by the appellee that it is beyond the power of the Senate thus to control the conduct of the Executive. To concede such a power to a single House, or even to both Houses acting together, is to assign to their rules the force of a general law passed by both Houses, signed by the President and binding on every citizen. Indeed a concession of such power might even involve the conclusion that a rule of the Senate or House is of greater efficacy than an act of Congress, inasmuch as the latter will not be permitted by this Court to limit the Executive in the discharge of a constitutional function. Let it be assumed, for example, that the Senate rules were silent on the subject of reconsideration but that an act of Congress provided that the President should not, for a six months' period, make an appointment after notice of Senate confirmation and that, within that period, Senate consent might be withdrawn: is it to be supposed that such an act, passed, perhaps, over the President's veto, would be upheld by this Court? Would not that be a clear case of legislative encroachment upon the discharge of a constitutional function by the Executive? Each House under the Constitution may "determine the rules of its proceedings" —but not those of the President or of the Supreme Court. Neither House may "by its rules ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." This is the language of Mr. Justice Brewer, speaking for the Court in *U. S.* v. *Ballin* (144 U. S., 1891 at p. 5). It was there decided that the rule of the House of Representatives permitting the Speaker and the clerk to determine by count the presence or absence of

a quorum was a valid exercise of the rule-making power. That decision goes no further than to sustain a reasonable exercise of the power to determine an intra-mural question of legislative procedure, the very case covered by the constitutional grant of power. But to invest Senate rules with a kind of extra-territorial quality is to put it within the power of one branch of Government to regulate the conduct of another by the device of seeming to regulate only its own. The "consent" contemplated by the Constitution is obviously an unconditional consent: no Senate rule can have the effect of annexing to it a clause of defeasance.

In order that the governmental machinery may operate smoothly there must be a specific formality in communicating to each branch the action taken by another, in every case where further official action is intended to follow. The President acts with utmost formality when he notifies the Senate of a nomination. The Senate acts with equal formality when notifying him that he may or may not proceed with the appointment. In neither case should there be mental or other reservations. In each instance it is essential that the notice sent should tell the whole story and that the recipient should be free to act upon it as authentic and decisive. In the instant case all necessary formality was observed. This is the message, sent by special messenger, which the Senate sent and the President received:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES

Saturday, December 20, 1930.

RESOLVED, That the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

FEDERAL POWER COMMISSION

George Otis Smith, to be a member for the term expiring June 22, 1935.

. . . . . .

Attest:

(signed) EDWIN P. THAYER
Secretary."

This is the message which either has the quality and character attributed to it by the appellee or is a purposeless and even a misleading and mischievous communication.

4. When we turn to the Senate rules themselves, they do not furnish a basis for the argument that they were intended to provide for an interlocutory approval and confirmation of the President's nomination. Section 4 of Rule XXXVIII provides that the Secretary shall not notify the President of a confirmation or a rejection of his nomination until the expiration of the time limited for making a motion to reconsider—that is to say, until the next two days of actual executive session after the day of the original consideration shall have expired—*unless otherwise ordered by the Senate.* The Senate intends to retain control of the subject-matter for that period of time *unless it orders otherwise.* In the latter event, of course, its control is gone. Section 3 provides for reconsideration within the period specified, provided that if notice of the confirmation or rejection has been sent to the President, the motion to reconsider must be accompanied by a motion to request the President to return such notification. In short, consistently with section 4, section 3 contemplates that if the Senate has "*ordered*" that the President shall be notified and if he has been notified of the action taken, then it is necessary

that he should return the notification in order that the Senate shall have the right to reconsider—that is to say, shall have regained control of the subject-matter.

The rules recognize the settled parliamentary practice as to parting with control of the transaction; and, as held by the Court below, notice of confirmation sent to the President was intended to be not merely a purposeless gesture, but information on which the Executive might rely.

In the appellant's brief (as for example in the note on p. 30) there is a confusion of thought between *a motion to reconsider* and subsequent reconsideration after the motion is adopted. Of course the *motion* may be entertained even when control has gone; but reversal of former action cannot take place unless control is restored.

It is, of course, not contended by the appellant that the Senate ever in fact called the President's attention to the rule in regard to reconsideration or that there is any such practice as to file with the President notice of changes made in the Senate rules.

The reasonable, as well as the only constitutional interpretation of these rules is that they contemplate that if the Senate parts with control by notification sent to the Presiden, the Senate's power is exhausted unless and until such control is again restored.

5. Furthermore, while a practice could not change the fundamental law (as Mr. Justice Gordon in his opinion in the Court below so clearly shows) the Senate by its own practice and acquiescence, has construed the portion of its rules in question in accordance with our contention. The Senate has never before contended that it had the legal right to *reconsider its approval of a President's nomination after the President had in reliance on such approval ap-*

pointed and had refused to accede to a Senate request for return of control.

6. There are some cases (there is no certainty that there are more than a very few) where the Executive after signing a commission restored control to the Senate at the request of the latter. But the appointee in these cases never asserted his legal rights and all that such instances show is that the then Executive was concerned less with the legal rights of the appointee than with the desirability of conciliating the Senate. Probably in some cases the President never even considered the legal and constitutional phase of the matter. In some cases the Executive refused to restore control and thus protected the appointee, and the Senate acquiesced.

There never was a uniform presidential practice of granting the Senate's request by restoring to the Senate control after the appointment had been made. But even if there had been, such a practice could not affect the appointee's legal rights.

7. It is not necessary to discuss whether unanimous consent is necessary to the abrogation or suspension by the Senate of its own rules. It might be pointed out that there is in substance no difference between a unanimous suspension of the rules followed by a vote to notify the President at once, and simply a unanimous vote to notify the President at once. But the point is that there was no need of unanimous consent to suspension because no suspension of the rules was involved. The rules expressly provide that the Senate may order the immediate sending of notice, and this was done. It is true, and of course the Senate knew, that after sending the notice, the Senate could ask the Presi-

dent to restore the subject-matter to its control, and that, if he were in a position to acquiesce and did acquiesce, they could then reverse their previous action. But where the matter has passed out of the control of the President he has no power to restore such control to the Senate. The only way to get the appointee out of office is by removal. The Senate knew and intended this. The Senate, at the time of directing immediate notice to be sent to the President, was content with the possibility of regaining control if it wanted to change its mind. At the time it had no thought of so doing.

8. It is entirely unnecessary to consider a supposititious case of sharp practice—a case in which the President, having received official notice from the Senate of confirmation of one of his nominations, but having likewise received actual notice that such consent had in the meantime been reversed, immediately signs and causes to be sealed a commission to his appointee and delivers it in order to outwit the Senate. Possibly the result would be different there, but at any rate that is not this case.

9. In conclusion and to sum up what has here been said, the only point left open by the decision in *Marbury* v. *Madison* is this: whether the Senate can annul an appointment after it has directed its officer to send notice of confirmation to the President and after he (in ignorance of a Senate rule reserving the right to reconsider within a certain period or, if knowing of the rule, yet supposing that the Senate, as the rule itself permitted, had voted to forego this period of reconsideration) has relied on the official notice and appointed his nominee to office. It is submitted that the Constitution permits the Senate no such reserved control;

that the rules of the Senate have never contemplated, and the Senate by its own practice has never intimated that it claimed any such reserved control; that even if the rules clearly expressed any such intention, such rules are made only for the regulation of Senate procedure and have not the effect of a law which operates upon all alike whether they know of its terms or not; that no question of the abrogation of the rules of the Senate (by unanimous consent or otherwise) is involved in this case; that the Government could not function if the President were not entitled to rely upon official notice of confirmation of his nomination received from the Senate; and that the appellee was validly appointed to his office under the Constitution and laws of the United States and can be deprived thereof only by removal according to law.

CONCLUSION.

The judgment of the Supreme Court of the District of Columbia should be affirmed and the petition of the appellant for a writ of *quo warranto* to oust and exclude the appellee from the office of member and chairman of the Federal Power Commission should be denied.

Respectfully submitted:

GEORGE WHARTON PEPPER,
Attorney for Appellee.

ERNEST SCOTT,
On the Brief.

APPENDIX A.

Review of the Decisions of State Courts Dealing With Reconsideration by Legislative Bodies.

State decisions support the proposition that the right of a deliberative body to reconsider a vote is lost as soon as control over the subject-matter has passed out of its hands.

APPENDIX A.

The appellant has cited certain decisions of state courts to substantiate its contention that a legislative body may reconsider its vote at any time during the period fixed by its rule and that action cannot be held to be final prior to the expiration of that period. Before considering these cases specifically, it may be well to distinguish between executive and elective appointment.

In the case of an office not filled by popular election, a public official may derive his title to office either from appointment by a single executive or from appointment by the body authorized by law to make it.

If the executive has the power and duty of filling an office, it may be, under applicable law, that the responsibility is wholly his or that his freedom of choice is limited.

In either event, the act of appointment is his alone. In the absence of prescribed formality, any act indicating an executed intention to appoint, done after consent (if requisite) has been obtained, will suffice to confer title to the office. When such an act has been done, the rights of the official become vested. He can thereafter be separated from his office only by death, resignation, expiration of term or lawful removal. If, after valid appointment, the official stands in need of evidence of appointment or of other formal assurance, he is entitled to a mandamus directed to the subordinate officer whose ministerial duty it is to supply the lack.

If title to the office is to be conferred by elective appointment, the electing body under the law may have the whole responsibility of choice or it may be limited by

the requirement that it shall act only upon a nomination or nominations submitted to it by the Executive.

In either case, it is the act of election that confers title. In conducting the election or in reconsidering it, the electing body is governed by rules which are either prescribed by superior authority or are of its own making. It is conceivable that its rules for reconsidering its own action might be so unreasonable that a court would be asked to declare the act of election irrevocable; but in that event the contest would be merely between the electing body and the official. Even in a case in which the election took place upon an executive nomination, the executive would not be directly concerned with the question of reconsideration.

Certain cases have held that where a deliberative body is charged with the duty of making an appointment to public office, the vote of appointment is a completed executive act and not subject to reconsideration.

See *State v. Barbour,* 53 Conn. 76, 22 Atl. 686 (1885);

State v. Starr, 78 Conn. 638, 63 Atl. 512 (1906);

State v. Phillips, 79 Maine 506, 10 Atl. 447 (1887);

State v. Miller, 62 Ohio State 436, 57 N. E. 227 (1900);

State v. Tyrrell, 158 Wis. 425, 149 N. W. 280 (1914).

It is unnecessary to discuss this disputable proposition. The present case is not one in which the appointing power is vested in a collective body, but is one where the appointing power is vested exclusively in the Executive. It seems plain, however, that the rule laid down in the cases above referred to is not applicable to resolutions of consent to a

nomination which is to be followed by executive appointment.

The following cases indicate the source of an appointee's title to office as being either appointive or elective:

Justices of Jefferson County v. Clark, 1 T. B. Monroe (Kentucky) 82 (1824);

U. S. v. LeBaron, 19 Howard 73 (1856);

Conger v. Gilmer, 32 Calif. 75 (1867);

Lane v. Commonwealth, 103 Pa. 481 (1883);

Harrington v. Pardee, 1 Calif. App. 278, 82 Pac. 83 (1905);

Allen v. Morton, 94 Ark. 405, 127 S. W. 450 (1910).

But these need not be here discussed since, under *Marbury* v. *Madison,* 1 Cranch 137, it is plain that officers of the United States derive their title *not from Senatorial election but from Presidential appointment,* and that the Executive, in making the appointment, is not given the whole responsibility of choice but must act with the advice and consent of the Senate.

Five cases cited at some length by the appellant are here analyzed. They are: *People* v. *Davis; Witherspoon* v. *State; Attorney General* v. *Oakman; Wood* v. *Cutter;* and *Crawford* v. *Gilchrist,* all decisions of state courts.

As before stated, the appellant deems these cases authority for the proposition that a legislative body may reconsider its vote during the entire time limited by its rules for reconsideration, regardless of what action it takes in the interim. Appellee views these cases differently and contends that they are merely examples of the general parliamentary rule that reconsideration by a legislative body

may take place as long as it retans possession and control of the subject matter sought to be reconsidered. This general parliamentary rule was early stated in Jefferson's Manual, Sec. XLIII, 2d paragraph, as follows:

> "If, after a vote, the paper on which it is passed has been parted with, there can be no reconsideration; as if a vote has been for the passage of a Bill and the Bill has been sent to the other House."

Then if a motion to reconsider has prevailed but control is not thereafter restored, reconsideration becomes a parliamentary impossibility.

With this well-settled principle in mind, a careful examination of the cases on which the appellant relies will be made:

1. In PEOPLE EX REL. MCMAHON V. DAVIS, 284 Ill. 439, 120 N. E. 326 (1918), the Supreme Court of Illinois dealt with one phase of the subject of reconsideration. The Illinois school law provided for a board of education whose members were "to be appointed by the Mayor with the approval of the City Council." The Mayor accordingly submitted to the Council the names of nine persons for appointment as members of the board of education. A motion to concur in the appointment of these persons was put and carried. Thereupon, and at the same session, a motion to reconsider was made; but this was laid upon the table on the motion of the member who had moved the resolution of concurrence. The Council thereupon adjourned for four days until the date of the next regular session. On reconvening (and after an immaterial skirmish over a proposal to adjourn) a motion was made and carried to take from the table the motion of reconsideration which was lying there. The motion to reconsider was then adopted and when the question of con-

currence in the appointment was again put it was defeated by a decisive vote. Meanwhile the Mayor's nominees had assumed to discharge the duties of board members. The prior incumbents thereupon petitioned for leave to file an information in the nature of *quo warranto* against the nine. An order of leave was afterward vacated and the cause finally came before the Supreme Court on appeal. The Court held that the function of the Council in approving or disapproving the executive act of the Mayor was discretionary and deliberative and that its action might properly be reconsidered in accordance with the rules of the Council. The motion to reconsider had been made at the same session as the motion to concur. The resolution to table had had the effect of keeping the resolution of reconsideration in the possession of the Council awaiting its final action. The final act was the act of the Council. It was not a case in which the Executive had acted upon notice of confirmation. The conduct of the nine respondents in exercising meanwhile the powers and duties of office could give them no title; and for these reasons the judgment appealed from was reversed, three judges dissenting.

2. WITHERSPOON v. STATE, 138 Miss. 310, 103 So. 134 (1925). A *quo warranto* was instituted to determine the title to the office of Commissioner of a Mississippi Levee District. The state constitution vested in the Governor the power to appoint, "subject to the confirmation of the Senate." Witherspoon, the respondent, alleged that he had been appointed to the office in question by Governor Russell, that the Senate had confirmed his appointment and that a commission had subsequently been issued to him by the Governor. West,

the relator, alleged first that the vote of confirmation relied upon by Witherspoon had been reconsidered by the Senate *before* notice of confirmation had been sent to the Governor and within the time allowed for reconsideration by the Senate rules; and, second, that, with the consent of the Senate, Governor Russell's successor had withdrawn Witherspoon's name after this reconsideration, had nominated West to the office and that West's nomination had been duly confirmed. At the trial West introduced in evidence a copy (certified by the Secretary of the Senate) of certain pages of the Senate's executive journal, which supported West's averments as to the absence of any order of notice to the Governor and as to the reconsideration of the resolution consenting to Witherspoon's appointment. Witherspoon introduced in evidence a certificate by the Secretary of State, which disclosed that the Senate's journals filed in his office by the Secretary of the Senate did not show confirmation by the Senate of Witherspoon's nomination. The Trial Court, either because of the evidence that Witherspoon's nomination had not been confirmed, or because satisfied with the evidence that the confirmation, if voted, had been reconsidered and West's nomination confirmed, adjudged West to be entitled to the office. On appeal the Court held that the Trial Court had erred in admitting and acting upon the extracts from the executive journal certified by the Secretary of the Senate and offered by the relator, West, because under the applicable state legislation the exclusive method of ascertaining the contents of the Senate journal was to require production of the original certified by the Secretary of State or a copy thereof as authorized by the State Code. This error necessitated reversal; but, in reversing, the court declined to give final judgment

against the relator, because the Court was of opinion that, upon the facts as alleged by him, it was competent for the Senate to reconsider its vote of confirmation; and therefore remanded the cause to give him an opportunity to correct the technical defect in his proof. The Court disposed of Witherspoon's contention that, in the absence of competent evidence to support the relator's title, there was a presumption of the validity of Witherspoon's commission, by pointing out that the evidence introduced by the latter tended to show that his own nomination had never been confirmed and that therefore the Governor's commission was void. Justice Ethridge (dissenting in part) agreed that the evidence had been improperly received, doubted whether the record could ever be corrected to remove the difficulty and inclined to the view that Senatorial consent to appointment, once given, cannot be reconsidered. The concluding paragraph of his opinion contains some cogent suggestions of the practical evils likely to ensue from any other doctrine. There is nothing in the record or in the majority opinion which even remotely suggests that a right of reconsideration exists after the Senate, by notifying the Executive of consent to appointment, has parted with control of the subject-matter and has thus left the Executive free to act.

3. Attorney General v. Oakman, 126 Mich. 717, 86 N. W. 151 (1901) was a *quo warranto* to determine the title to the office of Tax Commissioner. In this case power to appoint was vested in the Governor by and with the advice and consent of the Senate. The Governor nominated Oakman, a resolution of confirmation was adopted by the Senate and at the same session a motion to reconsider prevailed. It was contended, on behalf of Oakman, that in consenting to his

appointment the Senate had performed an executive and not a legislative duty and that when it had once given its consent it had exhausted its power. The court [citing *Wood* v. *Cutter, infra,* and *State* v. *Foster,* 7 N. J. Law 101 (1823)] held that "where an appointment or concurrence in an appointment is the subject of action by a deliberative body that body may by rules of its own or acting under usual parliamentary rules cast a vote upon the subject which is subject to reconsideration." The Court noted the reaffirmance of *Wood* v. *Cutter,* in *Reed* v. *School Committee,* 176 Mass. 473, and cited also with approval *Whitney* v. *Van Buskirk, infra, Conger* v. *Gilmer, supra, Baker* v. *Cushman,* 127 Mass. 105, and *The People* v. *Mills,* 32 Hun. 459.

These three decisions (*People* v. *Davis, Witherspoon* v. *State, Attorney General* v. *Oakman*) when carefully analyzed, cannot be cited as authority for the principle contended for by the appellant. In the first place, the fundamental distinction exists that they are cases of legislative election rather than executive appointment. The last act required by the body vested with the power of appointment has been done when confirmation, approval or consent is given. This stands in illuminating contrast to the instant case, where the last act required is not the consent of the Senate but the signing of the commission by the President.

In the next place, these cases do not purport to decide the single vital question presented by the case at bar. The most significant factor is missing in each instance. In each case the legislative body vested with the power of approval gave no notice to the appointee or to the Executive that they had advised and consented to the nomination. By failing to give such notice, they in fact signified to the appointees and to the Executive that they intended to keep the matter

in their possession and control for consideration or reconsideration under their own rules. To assume the duties of office in the face of such a situation as was done by the nominees in the case of *People* v. *Davis*, could not transform a conditional approval into an unconditional consent. Likewise, to commission a nominee before the Senate reconsideration period had expired and without notice from the Senate that it had advised and consented to the appointment, as was done in the case of *Witherspoon* v. *State*, could not vest title in him. This is as far as the above cases go. This much the appellee willingly concedes. It is submitted to the Court that the decisions are not only not inconsistent with the Jeffersonian principle of reconsideration, but directly support that principle.

4. In the case of Wood v. Cutter, 138 Mass. 149 (1884), the fourth authority relied upon by appellant, Holmes, *J.*, speaking for the Court, specifically refused to decide the question at issue in the instant case by observing, at page 150:

> "Whether the Board could have cut down their powers of deliberation by communicating their vote before the meeting was closed, or otherwise, is not a question before us."

5. Crawford v. Gilchrist, 64 Florida 41 (1912) is discussed and quoted at length by the appellant. It was a suit by the governor, in his official capacity and as an individual, for the purpose of enjoining the secretary of state from publishing and placing on the ballots a certain proposed amendment to the state constitution. The defendant appealed to the Supreme Court praying a supersedeas against a temporary injunction granted by the lower court. The appeal was denied.

The resolution in dispute was adopted by the House on a three-fifths vote, as required by the constitution. This resolution then came before the Senate and that body likewise approved it by a three-fifths vote. This action was immediately certified to the House. On the succeeding day, a senator who had voted with the majority moved that the resolution be reconsidered and at the same time moved that the resolution be recalled from the House of Representatives. The Senate request for return was duly complied with by the House, and the motion to reconsider was passed by a bare majority vote in the Senate. It was then agreed to defer reconsideration. The record of the Senate Journal did not show that any further action respecting the resolution was taken by the Senate.

The Florida Constitution at the time provided that constitutional amendments must be agreed to by a three-fifths vote of each House. The reconsideration rules of the Senate, in brief, provided that when a vote has been taken, it shall be in order for any member voting in the majority to move a reconsideration thereof on the same or succeeding day (Rule 14), and further provided that the rules of parliamentary practice, comprised in Jefferson's Manual, govern the Senate in all cases to which they are applicable (Rule 34). On this record the Court held (two Justices dissenting on the question of the right of the Governor to bring the action) that the resolution was not "finally agreed to" by the Senate as demanded by the Florida Constitution.

The very statement of the case prevents it from having any force in support of the contention made by the appellant. The Jeffersonian principle of control was expressly made part of the reconsideration rules of the Senate. In direct contrast to the facts of the instant case, the House

did not refuse to return the resolution; on the contrary, control was restored to the Senate when the House complied with the Senate's request for a return of the resolution. In other words, as in the other cases relied upon by the appellant, the Florida Court was not faced with the issue presented in the instant case. It was merely asked to decide two questions (aside from the technical right of the Governor to bring the action) (1) the right of the Senate to reconsider a matter actually restored to its control; (2) the effect of the successful motion to reconsider upon the original vote of approval. The decision of the court on both points, namely, (1) that reconsideration was proper; (2) that it destroyed the original approval, was inevitable under the Jeffersonian principles expressly incorporated into the standing rules of the Senate. Such decision in no way conflicts with the appellee's contention.

. . . . . .

Three state decisions have been found which, from the appellee's point of view, constitute persuasive authority on the question at issue. These cases are:

In re Fitzgerald,
State v. *Wadhams,* and
Whitney v. *Van Buskirk.*

For the convenience of the Court, these decisions will be set out in some detail.

1. Matter of FITZGERALD, 88 Appellate Div. Reports (N. Y.), 434, was decided in 1903. It was a statutory proceeding by Fitzgerald to compel Keenan, acting as Clerk of the City of Olean, to recognize Fitzgerald's claim of title to that office. Keenan had been duly appointed and had qualified to serve for a term of two years or until the ap-

pointment of his successor. The question was whether Fitzgerald had been lawfully appointed to succeed him. The charter of Olean provided that "the Mayor shall nominate and with the consent of the Common Council appoint." On March 2, 1903, the Mayor appointed Fitzgerald and on the same day the Council passed a resolution of consent. Thereafter, on March 9th, Fitzgerald took and filed the oath of office and within the statutory period filed his official bond. On March 20th, at an adjourned meeting of the Council, a resolution was adopted to reject and disapprove such nomination. In determining that Fitzgerald had been validly appointed, the Court observed that the appointment made and confirmed on March 2d was in all respects regular, that he had complied with the statutory requirement respecting the filing of his oath and bond and that the resolution of March 20th was not effective either to invalidate the appointment or to operate as a removal from office. *Marbury* v. *Madison* and *Achley's Case,* 4 Abbott's Practice Reps. N. Y. 35, were cited with approval.

2. STATE EX REL. ATTORNEY-GENERAL v. WADHAMS, 64 Minn. 318, 67 N. W. 64 (1896) was a *quo warranto* to determine title to the office of City Assessor in the City of Duluth. The Mayor was by law authorized, with the advice and consent of the Common Council, to appoint an assessor, the assessor to hold office for a term of two years and until his successor should qualify. On March 12, 1894, the Mayor appointed Wadhams assessor for a term of two years beginning on the first Monday of April in 1894. On March 19, 1894, this appointment was confirmed by the Common Council and Wadhams in due time entered into possession. On March 19, 1896, the Mayor nominated Hawks in the place of

Wadhams and the Council passed a resolution of confirmation. This resolution was presented to the Mayor, who signed and approved it March 24th. This approval and the other proceedings of the City Council were published in the official newspaper on March 27th. On March 30th a motion to reconsider the confirmation of Hawks was adopted. Hawks duly filed an official bond, took the oath of office and demanded possession of the office on the first Monday in April. A judgment of ouster against Wadhams was entered in Hawks's favor. Before the attempted reconsideration "the appointment" said the Court "had been promulgated in addition to being duly declared and entered of record and notice thereof publicly proclaimed." This case (whether it be interpreted as a case of appointment by the Mayor or of elective appointment by the Council) decides that the right of reconsideration is lost where steps have been taken inconsistent with retention of control over the pending matter.

3. STATE EX REL. WHITNEY V. VAN BUSKIRK, 40 N. J. Law 463 (1878). This was a mandamus to determine whether Van Buskirk had title to the office of Chief of Police in the City of Bayonne. Appointment to this office was upon a nomination by the Mayor and a confirmation of his nominee by the Common Council. It appeared that Whitney, the Relator, had held the office and on December 3, 1877, had tendered his resignation thereof to the Mayor and Council, which on the following day both had accepted. It further appeared that the Mayor had then nominated Van Buskirk, his appointment to take effect on the 1st of January and that this nomination had been confirmed by the Council. On the 11th of December the Council reconsidered the vote by which Van Buskirk's nomination was confirmed

and by which Whitney's resignation had been accepted. The Mayor disregarded these proceedings and on December 20th notified Van Buskirk of his appointment and two days later administered the oath of office to him. Van Buskirk entered into possession on the 1st of January against the protest of Whitney. It was held that the right to reconsider the acceptance of Whitney's resignation was ended when the subsequent nomination of Van Buskirk was voted upon and confirmed. "This latter action was entirely inconsistent with the idea that the matter of resignation still remained open for further deliberation."

It will be noted that in all three of these cases the legislative body had no definite rules limiting the right to reconsider.

The appellant contends that this difference gives rise to a fundamental distinction which makes these decisions irrelevant and inapplicable to the case at bar. The appellee does not so understand these cases, but urges that they are pertinent illustrations of the application of the Jeffersonian principle which underlies the present standing rules of the Senate. This principle, restated, is that the right of a legislative body to reconsider ceases when the matter under consideration has passed beyond its control by virtue of an unequivocal act inconsistent with further review.

Appendix B will deal with the development of the standing rules of the Senate in regard to reconsideration, and is designed to demonstrate that under those rules the retention of control by the Senate is essential to its power of reconsideration.

APPENDIX B.

History and Interpretation of the Standing Rules of the Senate Dealing With Reconsideration of Confirmation or Rejection of Nominations.

Rules XXXVIII and XXXIX, when properly construed, mean that when the Senate has ordered notification to be sent to the President and the notice has been sent, its right of reconsideration has gone, unless the President thereafter voluntarily restores control of the transaction to it. The history of the rules supports this interpretation.

APPENDIX B.

The appellant contends that "Rules XXXVIII and XXXIX of the Standing Rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the appellee, even though the President had been formally notified of such consent." See Appellant's Brief, page 14.

It is, on the other hand, the contention of the appellee that a study of these rules indicates that *control of the subject-matter* is the significant factor; that when the Senate votes upon a nomination, it has, under its rules, an option to retain control for the next two days of actual executive session or to transmit control to the Executive by ordering that he be notified forthwith. It is conceded that, if the Executive appoints before the Senate has yielded control to him, the appointment is invalid and without effect. It is the further contention of the appellee that, if the Senate elects to notify the President forthwith, control of the transaction is thereby transferred to the Executive, who is thereafter free to make a constitutional appointment. If, within the two-day period, the Senate desires to reconsider its action, a Senator who has voted with the majority may move to reconsider if at the same time a motion is made to request the President to return the notification. If, and only if, the President voluntarily complies with this request for a return, control of the transaction is restored to the Senate, which may thereupon proceed to reconsider within the time allowed by its rules.

In view of this conflict of interpretation of the Senate rules, it is proper that they be set forth in full.

RULE XXXVIII.

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS.

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided,* That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: *Provided further,* That Rule XXXV shall apply to open executive sessions: *And provided further,* That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejec-

tion of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

RULE XXXIX.

THE PRESIDENT FURNISHED WITH COPIES OF RECORDS OF EXECUTIVE SESSIONS.

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the Executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

. . . . . .

Paragraphs 3 and 4 of Rule XXXVIII contain the provisions which are important for the purpose of the present discussion. In brief, paragraph 3 (which we shall term the general reconsideration rule) provides that when a nomination is confirmed or rejected, any Senator who voted in the majority may move for a reconsideration within the next two days of actual executive session, but if the notification of confirmation or rejection shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. There is no provision in the rule that if the request to restore possession is not complied with, the Senate may nevertheless vote a reconsideration, nor is there any provision in the rule that such course may be taken by the Senate if, after notification, the President has actually appointed and his reply to the Senate so states. Thus it will be seen that this section of the rule prescribes the limits of the period in which a motion

to reconsider may be made, and provides a method for requesting the Executive to restore control.

Paragraph 4 of the same rule covers notification to the President. This paragraph, which we shall call the notification provision, requires that nominations, confirmed or rejected, shall not be returned by the Secretary of the Senate unless one of three things happens:

1. Unless two days of actual executive session have expired without a motion for reconsideration having been made;

2. Unless a pending motion for reconsideration has been disposed of, or

3. *Unless the Senate has otherwise ordered.*

Thus it seems clear that the notification provision reserves to the Senate the right to order the Secretary to return the nomination to the President, confirmed or rejected, before the expiration of the two-day period. Unless this interpretation is given to the rule, the "otherwise ordered" clause is meaningless and futile.

It will be noted that, by the provisions of Rule XXXIX, no paper, except original treaties transmitted to the Senate by the President and finally acted upon by the Senate, shall be delivered from the office of the Secretary without a special order of the Senate. Under this rule the original letter of nomination must remain among the Senate's records. All that the President receives is an authenticated copy of the Senate resolution and it is this document which the President is requested to restore when the Senate asks him to return the notification. The notification to the President and (if he complies with the Senate's request) his return thereof to the Senate are symbolic of the transit of control from one branch of Government to the other.

A chart showing the development of the rules of the United States Senate, relating to reconsideration of confirmation or rejection of nominations, is attached to this brief as part of Appendix B.* An examination of this chart will indicate that all changes in the reconsideration rules, from 1790 down to the present, are not matters of substance but merely matters of detail. Reference to this chart will disclose the exact terminology of each rule in its various stages of evolution.

The first rule was adopted February 25, 1790. It provided:

> "Resolved, That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it."

In 1806 this resolution, in slightly expanded form, appeared as Rule 21 of the Standing Rules of the Senate. In brief it provided that when a question has been once made and carried, it may be subject to reconsideration within the three next days of actual session of the Senate, provided that no motion for reconsideration shall be in order

> "after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision; . . ."

With the exception of immaterial changes, including the cutting down of the reconsideration period from three days of actual session to two days, this rule remained in force until 1867. Under its provisions it was clear that, after

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* *This chart will be found at the end of this brief pasted to the inside of the back cover.*

notification to the President, reconsideration was out of order. The Senate so decided by unanimous vote in 1830 in the case of Isaac Hill (R., p. 34). However, it is significant that, despite this flat decision, the Senate, after notifying the President of its consent, in more than one hundred and sixty instances between 1830 and 1867, entertained a motion to reconsider and requested the Executive to return to it its resolution of consent. The cases of Barnes (R., p. 39), Goddard (R., p. 41), Frost (R., p. 46) and Fisk (R., p. 48) are examples of this practice. When the President voluntarily restored control to the Senate, reconsideration was allowed despite the technicality that under the Senate rule reconsideration was out of order.

The appellant admits this interpretation of the rules up to 1867 and the practice thereunder.

> "Prior to April 6, 1867, the rules were simpler in that, irrespective of the limited period during which the Senate could reconsider, its power to do so was *ipso facto* lost once the resolution had gone out of its possession announcing its decision. In other words, the transmittal of the resolution was made the controlling factor." (Appellant's Brief, p. 29.)
>
> . . . . . .
>
> "In fact, between the time of the decision of the Hill case on April 14, 1930 (typographical error, should be April 14, 1830) and the case of A. C. Fisk on March 28, 1867, the Senate requested the President to return resolutions in no less than 160 cases." (Appellant's Brief, p. 20.)

However, in 1867, says the appellant (p. 51), the Senate adopted new reconsideration rules fundamentally different from the rules in force up to that time, thus making all practice under the former completely immaterial and irrelevant.

The appellee maintains that the amendments then made to the standing rules were not matters of substance but merely matters of detail. The new general reconsideration provision, adopted on April 6, 1867, distinguished between the reconsideration of nominations and the reconsideration of other matters. It specifically excepted the reconsideration of nominations from the provision by which a motion to reconsider was not in order after the Senate had announced its decision. Thus the written rule covering reconsideration of nominations was made to conform to the prior unwritten practice in regard thereto by providing that a motion to reconsider, made after notification to the President, must always be accompanied by a motion to request the President to return the notification. No provision was incorporated into the rule suggesting that the Senate retained the right to reconsider in the event that the President did not comply with its request for a return of control. Furthermore, it was necessary to delete the clause declaring that a motion to reconsider was out of order after notification, so that, in the event the President complied with the request for a return, there would be no doubt as to the technical right of the Senate then to proceed with the desired reconsideration proceedings.

The general reconsideration provision dealing with nominations has retained the form adopted on April 6, 1867, excepting only that the time-limit has subsequently been extended to two days of actual executive session. It is worthy of note that reconsideration of matters other than nominations became, on January 17, 1877, the subject of a separate Standing Rule and has since so remained. It is also worthy of mention that the wording of the reconsider-

ation provisions covering other measures was assimilated to that of nominations at the same time.

Until 1867 the Secretary of the Senate, under a resolution adopted March 27, 1818, had been directed to return all nominations, approved or definitely acted upon by the Senate, to the President from day to day. Thus it will be seen that, although the general reconsideration rule fixed a two or three day period as the time in which a motion to reconsider might be entertained, nevertheless the notification provision trimmed down the actual period in which such a motion would be in order.

On April 3, 1867, Senator Howe proposed an amendment to the notification resolution of March 27, 1818. This resolution read as follows *:

> "RESOLVED that the following be added to the Standing Rules of the Senate:
>
> No resolution of the Senate, confirming or rejecting a nomination, shall be communicated to the President until the time for moving a reconsideration of same shall have transpired." (Senate Executive Journal, Vol. 15, Part 2, p. 631.).

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* *The resolution proposed by Senator Howe on April 3, 1867, will not be found in the record of this case. However, it is well settled that the Supreme Court may take judicial notice of the proceedings of the Senate as they appear in the Senate Executive Journal, where this resolution is recorded in full. See*

Gardner v. *Collector*, 6 Wallace 499 (1867);

Atchison, etc., R. R. v. *U. S.*, 284 U. S. 248 at p. 260 (1931).

This amendment was designed to extend the reconsideration period to two days of actual session of the Senate, as permitted under the general reconsideration rule in force at that time, by relieving the Secretary from the duty to return nominations definitely acted upon to the President from day to day.

On April 5, 1867, the Senator who had proposed this amendment to the resolution of March 27, 1818 (then part of Rule 43),

> "asked and obtained leave to withdraw his resolution of April 3, 1867 proposing an additional Standing Rule." (Senate Executive Journal, Vol. 15, Part 2, p. 644.)

On the very next day after the withdrawal of this resolution, the Senate incorporated the following provision into Rule 43 instead of the suggested amendment:

> ". . . and all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate; . . ."

On March 25, 1868, the notification provision of Rule 43 was changed to read as follows:

> "Nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate. . . ."

This is the present form of Section 4 of Rule XXXVIII.

From this brief survey of the historical development of the rules of the Senate, six facts are clear:

1. That, under the rules in force until 1867, the Senate made a practice of requesting the President to return nominations to it, and, in the event such request was complied with, of reconsidering nominations despite the fact that under its own rule reconsideration was out of order after notification had gone forward to the President, and despite the fact that no provision existed permitting such requests to be made.

2. That in 1867 the written rule was changed to conform with the well-established practice of the Senate.

3. That, under the rules in force before 1867, the Secretary was bound to return nominations definitely acted on to the President from day to day as such proceedings occurred.

4. That the Senate in 1867 considered an amendment to its rules which would prevent the Secretary from returning to the President a nomination definitely acted upon until the two-day period allowed by the reconsideration rule had expired.

5. That this proposed amendment to the rule was withdrawn in favor of an amendment which directed the Secretary to return a nomination definitely acted upon on the next day after such action is had, unless otherwise ordered by the Senate.

6. That within one year thereafter, the notification rule was changed to its present form, by which the Secretary of the Senate is directed not to return nominations definitely acted upon to the President until the expiration of the time limited for making a motion to reconsider, unless otherwise ordered by the Senate.

In brief, a careful examination of the development of the rules leads to the inevitable conclusion that the Senate has reserved for the full time limited by its rules, the right to reconsider a vote but has also reserved the right to dispose of the matter finally before that period has expired.

It is submitted that the foregoing analysis of these rules and their development, constitutes a complete answer to the interpretation placed upon them by the appellant.

The appellee further urges that appellant's construction would render these rules invalid and unconstitutional. Under Article I, Sec. 5 of the Constitution, the Senate is empowered to "determine the rules of its proceedings". It is nowhere empowered to pass rules which do more than regulate its proceedings. If the construction contended for by the appellant should prevail, the Senate rules would unreasonably interfere with the powers of the Executive, encroach upon his functions and hamper him in the proper administration of his constitutional duties. Such interpretation would permit an interlocutory or conditional consent. The Constitution does not recognize or contemplate anything but final advice and consent. Hence the construction urged by the appellant would require that the rules ignore the implied restraints placed upon the rule-making power of the Senate by the Constitution, and would violate the fundamental rights of the Executive in the premises. Furthermore, they would not bear a reasonable relation to the result sought to be attained by the Senate. No useful purpose would be served by the reservation of a right to notify the President concerning a state of mind which might change at any minute and upon which no action could be taken. If the Senate determines to hold open final action on a nomination, it need not order immediate notifi-

cation of its action to the President. The notification provision of the Senate rule clearly would permit the Senate to ponder its action for two days of actual executive session. If it wants to do otherwise than to ponder the matter, it is necessary that the Senate take affirmative action by ordering notification to be sent to the President. The mere fact that in recent years the Senate has ordered that the President be notified forthwith in a large number of instances, is only indicative of the fact that the Senate has of late seldom contemplated the possibility of changing its mind. Nor is such practice indicative of the fact that the Senate has placed no significance on formal notification of its action to the President. In short, if the object of the Senate rules on reconsideration is to give that body a chance either to ponder for a longer period or to act before its expiration, the construction contended for by the appellee provides the only reasonable method to obtain the desired end.

A study of Senate and Presidential practice, as shown by historical precedents, will support the foregoing survey of the Senate rules. Appendix C will set forth such a study.

APPENDIX C.

Senate, Departmental and Presidential Practice in the Light of the Reconsideration Rules of the United States Senate.

In the cases where commissions have been signed by the Executive, there has been no uniform practice in regard to return of resolutions by the President or in regard to reconsideration of nominees by the Senate. The record of recent executive proceedings of the Senate indicates that the Senate intends the President to rely upon notification of confirmation.

APPENDIX C.

The appellant has made the assertion (Appellant's Brief, p. 25) that "the multitudinous instances appearing in the Executive Journal of the Senate since April 6, 1867, in which the Senate requested of the President the return of a resolution, either of confirmation or rejection, and in which the President did in fact return such resolution" are confirmatory of appellant's interpretation of the Senate rules. It is conceded that where before an appointment has been made, the Senate has requested the President to return control of the matter to the Senate the Executive has invariably seen fit to comply with the Senate's request. This the appellee does not seek to controvert; in fact the appellee contends that the President ought in such case voluntarily to restore control of the transaction to the Senate, whereupon the Senate may proceed with the desired reconsideration. It is evident that, in the interest of proper government, such procedure is desirable.

However, the appellant goes further and states (pp. 51, 53) that in eighteen cases the President, after signing the appointee's commission, chose to restore control to the Senate and permit that body to proceed with reconsideration. Before dealing with these cases specifically, it must be stated that the evidence upon which the appellant bases his statements to the effect that the appointees were commissioned by the President prior to a return of the notification to the Senate, is obtained from two sources only:

1. The records of the executive offices of the White House.

2. The records of the Department concerned.

The Executive Journal of the Senate makes no reference to the issuance of commissions, except that some Presidential messages duly recorded therein inform the Senate that commissions had been issued before receipt of request for return. In no instance, however, does the Executive Journal indicate that a President has acquiesced in reconsideration by the Senate after he has issued a commission.

In many instances the interpretation of White House and departmental records depends entirely upon the course of practice pursued in the particular office involved. No one is now alive who can testify concerning this practice during the years 1867 to 1889, which is the period during which these questionable precedents relied upon by the appellant arose. Without proof of such practice these records are of little or no weight.

The appellant, on page 52 of his brief, has undertaken to explain this practice. This explanation is unsatisfactory. It is but a poor substitute for proof. It overlooks the principal factor in the situation. The entry in the records of the executive offices of the White House under the heading "Date of Commission" or "Commissioned" *does not necessarily constitute evidence of the date on which the President signed the commission.* On the contrary, the appellee submits that the entries under these headings indicate the date on the face of the commission but not the date of Presidential signature. The fact that until 1905 the heading under which the entry was made uniformly was "Date of Commission" substantiates appellee's position. Furthermore, reference to the record of this case will show that more often than otherwise the date in the White House Record under "Date of Commission" is the same date as the date of confirmation by the Senate. Thus this date

often antedates even the actual receipt of notice of confirmation by the President. [For examples see cases of Durkee (R. p. 78); Conant (R. p. 79).]

The fact is, as far as the appellee has been able to ascertain it, that the commission is prepared and completed in the appropriate department as soon as notification of the Senate's confirmation has reached it. The preparation of this commission in general involves the completing of the commission in all respects, even including date (very often the confirmation date), but always, of course, excepting the signature of the Executive. Therefore, it is not only possible, but more than likely, that a commission signed by the President on the twentieth of the month may bear a much earlier date than that on which signed. When the record of the commission is entered under the heading "Date of Commission" or "Commissioned" it is again probable, and more than likely, that the date entered will be the date of the filling out of the commission, and not the date of the signing of the commission. For example, the Court is referred to the case of James A. Cobb, appearing on pages 108-109 of the Record. Under the heading "Commissioned" appears the date "3/17/26". Under the heading "Remarks" appears the entry "Commission signed 6/12/26" (Also see Ligon case, R. p. 109). This again indicates that there is no necessary connection between the actual date of signing and the record entry. The implication to the contrary on p. 52 of the appellant's brief is sought to be supported by a statement that the appellant's version "was obtained from officials at the Executive Offices". Nothing in the record justifies this assertion; and (if we are to go outside the record) it is contrary to information given to the appellee at the same source. The

same sources of information were open to both appellant and appellee and were consulted with equal diligence.

In four of the cases relied on by the appellant (Nourse, Tubbs, Reeves and Kursheedt hereafter commented upon), the entries are of such doubtful character that it is wholly unjustifiable to base a flat assertion of fact upon them even if the settled course of practice were undisputed.

Furthermore, it must be borne in mind that the question whether in a particular case a commission has or has not been signed, is material only as between the President and the nominee. That the Senate is interested in nothing except compliance by the President with its request for restoration of control, is evidenced by the fact (already stated) that in no one of the cases wherein control was in fact restored, is there any indication in the Senate Executice Journal that a commission had, or had not, been signed. The most significant fact of all, however, is that in no one of the cases appearing in the records, has there ever been an instance before the present controversy arose, in which the Senate appears to have undertaken to vacate its previous action without a prior voluntary compliance by the President with its request for a return of the control, although in a few cases the Journal fails to record affirmatively the fact of such compliance.

The specific cases relied upon by the appellant will now be commented upon *seriatim*, the comment in each case being addressed to the statement of that case in the appellant's brief.

1. POLLOCK—(R. p. 50): There is no substantial basis for any assertion that in this case a commission was signed before return. It is entirely consistent with the record

that the commission made out in the War Department on April 11th was never actually signed by the President inasmuch as the request for a return had been received by him the day before.

2. JEFFRIES—(R. p. 52): It appears that, upon receipt of a message from the President, in which it was stated that he had acted upon notice of confirmation by the Senate before receiving the Senate's request for a return, the Senate took no further action with respect to this appointment.

3. SCOTT—(R. p. 56): June 7th is entered in the records of the White House under the heading "Date of Commission." It is significant that there is no entry showing a commission issued following the time when confirmation was returned after motion to reconsider had been withdrawn in the Senate. It is suggested for the reasons appearing on pages 56-58 hereof that the entry does not determine the date on which the commission was signed, but merely the date on the face of the commission eventually issued to Scott.

4. BEAN—(R. p. 59): January 17, 1872, appears as a date in the process of commissioning Bean. This however (as explained before) does not necessarily signify the date on which the commission was signed: *i. e.* the date of the executive act. After reconsideration by the Senate, on February 1st, Bean was subsequently reconfirmed.

5. LEGATE—(R. p. 60): Here even if a commission was signed after notice of consent and before request for return, the request for return was voluntarily complied with by the

President and the nomination was withdrawn at the request of the nominee.

6. NOURSE—(R. p. 61): The Court is referred to the history of this case appearing on page 61 of the Record, where an entry will be found to the effect that the commission was "not issued."

7. KNIGHT—(R. p. 64): The date of the commission appears as prior to the date of the return and the nominee was reconfirmed. Therefore, the remarks pertinent to the Scott and Bean cases are applicable here.

8. SHUMARD—(R. p. 64): The White House Record in this case indicates that the President did comply with the Senate's request for return following the issuance of the commission to his nominee since the nominee was never reconfirmed.

9. SHANNON—(R. p. 66), 10. BLISS (R. p. 66) and 11. CLARK (R. p. 68): The same remarks are applicable in these cases as were made concerning the Scott case.

12. TUBBS—(R. p. 76): The entry in the records in the executive offices of the White House, under the heading "Commissioned", appears to have been erased.

13. DURKEE—(R. p. 78): The same remarks made in the Scott case are here applicable since the Senate on July 1, 1879, finally disposed of the matter by laying the motion to reconsider on the table.

14. MILES—(R. p. 83), 15. PRITCHARD (R. p. 84): The same remarks are applicable to these cases as were made in the case of Scott.

16. REEVES—(R. p. 88): The entry in the White House records under the heading "Date of Commission" was scratched out.

17. KURSHEEDT—(R. p. 92): A line is drawn through the entry in the records of the White House under the heading "Date of Commission."

18. PLIMLEY—(R. p. 97): The Treasury Department Record in this case conclusively indicates that the Plimley commission was signed by the President prior to the time he elected to return the resolution of consent to the Senate.

A summary of these cases will indicate that in only four instances can it be asserted with reasonable historical positiveness that the return took place in compliance with the Senate's request after commissions had been signed. These cases are those of Jeffries, Legate, Shumard, and Plimley. In the Jeffries case the return took the form of a message notifying the Senate that an appointment had been made, upon receipt of which the Senate took no further action. An inferior officer was involved in the Shumard case where the President may well have preferred to comply with the Senate's request instead of gratifying the wishes of the nominee. In the Legate case the nomination was withdrawn at the request of the nominee. In the fourth instance, that of William Plimley (the only case which has arisen during the last thirty years) President Roosevelt took the matter into his own hands, extracted a signed commission from the mails, and settled the matter by withdrawing Plimley's nomination on his own motion. In more numerous cases the President has refused to comply with the Senate's request for a return of the notification

after a commission has been issued by him. Instances of such refusal can be found in the cases of Barnes (R. p. 39), Goddard (R. p. 41), Heath (R. p. 44), Frost (R. p. 46), Colby (R. p. 69) and Marks (R. p. 74). In each of these cases the Senate considered an executive reply that the appointee had already been commissioned as sufficient, as likewise it did in the Jeffries case (R. p. 52), even though the President returned the resolution.

From this survey it is evident that there has been no long established practice which gives foundation for the construction which (according to appellant's contention) the Senate has placed upon its rules. On the contrary, it is urged that whatever weight can be given to the foregoing precedents is favorable to the appellee's contention.

It will be recalled that in the instant case confirmation of the appellee was voted on December 20, 1930. On the same day the Senate ordered that the President be notified forthwith. The appellant contends that the formal notification made pursuant to this order constituted no more than a message of sympathy and good cheer. The appellee, in view of this contention, has examined the record of Senate executive proceedings in respect to the confirmation of nominations appearing in the Congressional Record since January 1, 1931. It is urged with confidence that unlike the precedents hereinbefore discussed, this examination throws real light upon the interpretation the Senate has placed upon its rules, because in each case the Record discloses the reason why the Senate preferred to notify the President forthwith instead of awaiting the expiration of the reconsideration period.

The following proceedings* deemed apposite by the appellee are recorded:

(1) 71st Congress—3rd Session.
Congressional Record—Volume 74—Part 4—p. 4044. February 5, 1931.

MR. HEFLIN. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore (Mr. Moses). The Senator will state it.

MR. HEFLIN. Just what is the status, then, of an appointee when the Senate confirms him and the President is not notified?

The PRESIDENT pro tempore. It waits until the statutory time for a reconsideration has expired.

MR. HEFLIN. Until two other executive session days have passed?

The PRESIDENT pro tempore. Two executive session days must intervene before a commission can issue.

. . . . . .

(2) 72d Congress—1st Session.
Congressional Record—Volume 75—p. 1003. December 21, 1931.

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* *The proceedings to be referred to will not be found in the record of this case. However, it is well settled that the Supreme Court may take judicial notice of them. See Gardner* v. *Collector*, 6 Wallace 499 (1867); *Atchison etc. R. R.* v. *U. S.*, 284 U. S. 248, at p. 260 (1931).

NOTIFICATION TO THE PRESIDENT.

MR. CO[illegible]ZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were to-day confirmed cannot hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

. . . . . .

From the foregoing it is plain that the Senate knew and understood that if no order of notification was made, the nomination remained within its control during two days of actual executive session, and in the interim the President neither could appoint nor could the nominee hold office.

The Senate, although understanding the practical result which ensued from its failure to order notification to proceed to the President, does not order such notification as a matter of course in all cases. On the contrary, it is important to note that, in a large number of instances, after confirmation no motion was even made that the President be notified. For example, on February 4, 1931, more than 250 nominees were confirmed without an order made to notify the President (Congressional Record, Vol. 74, Part 4, pp. 3938-3939). Likewise, on February 10th and February 17th, 1932, large groups of nominees were confirmed, no effort being made to notify the President. (Congressional Record, Vol. 75, pp. 3782 and 4273). Further, in five instances at least, objection was made when, after confirmation, the Presiding Officer announced that without objection the President would be notified. (See proceedings for January

9th, 1931, Congressional Record, Vol. 74, Part 2, pp. 1748-1749; January 13th, 1931, *id.* p. 2066; January 28th, 1931, Congressional Record, Vol. 74, Part 3, p. 3393; December 22nd, 1931, Congressional Record, Vol. 75, p. 1131; January 11th, 1932, *id.* pp. 1770-71). Thus it will be seen that it is not by any means universal practice to move that the President be notified forthwith, nor is it unusual that, where such a motion is made, its adoption should be blocked by objection.

It remains to refer to the most significant proceedings, all of which have occurred since the litigation in the case at bar was instituted. They are eight in number and are here set out in some detail for the convenience of the Court:

(1) Congressional Record—Volume 74—Part 7.
Pp. 6489-6490. February 28, 1931.

THE JUDICIARY.

The Chief Clerk read the nomination of Louie W. Strum to be United States district judge, southern district of Florida (additional position).

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

MR. FLETCHER. Mr. President, this judge is very much needed, and has been for some months. He is approved by both Senators from Florida, and was unanimously approved by the subcommittee of the Committee on the Judiciary and by the full Committee on the Judiciary. There is no opposition on record. I ask unanimous consent to waive the rule about two subsequent executive sessions, and that the President be notified with regard to this action.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Florida that the President be notified of the action taken in the confirmation of Judge Strum? The Chair hears none, and the President will be notified.

. . . . . .

(2) 72d Congress—1st Session.

December 21, 1931, Cong. Rec. p. 1003:

NOTIFICATION TO THE PRESIDENT.

MR. COUZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were today confirmed cannot hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

MR. COUZENS. I ask unanimous consent, then, that the President be notified of those confirmations.

MR. MCNARY. Mr. President, if the Senator will withhold that request just a moment——

MR. COUZENS. Certainly.

MR. MCNARY. I wish to move that all confirmations made on the 17th and 18th and to-day be released and the President be notified. That will cover them all.

The VICE PRESIDENT. Is there objection? The Chair hears none, and it is so ordered. The order includes the confirmations of to-day. The President will be notified.

. . . . . .

(3) December 22, 1931—Cong. Rec. p. 1131.

COAST GUARD.

Robert B. Adams, of Massachusetts, to be engineer in chief for a period of four years, to rank as such from December 18, 1931, a reappointment.

THE VICE PRESIDENT. The question is on confirming the nomination.

The nomination was confirmed.

MR. COPELAND. Mr. President, I ask unanimous consent that the President be notified.

THE VICE PRESIDENT. Is there objection?

MR. NORRIS. Mr. President, I would like to make an inquiry about that. Is there any reason why the President should be notified?

MR. COPELAND. Yes; this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty.

THE VICE PRESIDENT. Is there objection to the request of the Senator from New York? The Chair hears none, and the President will be notified.

. . . . . .

(4) February 1, 1932—Cong. Rec., p. 3071.

NOTIFICATION TO THE PRESIDENT FOR CONFIRMATIONS.

MR. ROBINSON of Arkansas. Mr. President, inasmuch as the presence of a quorum has just been announced, I desire to ask the attention of the Senate to a matter of some importance.

On Thursday, the last day the Senate was in session, there was a confirmation of three appointees to serve on the Reconstruction Finance Corporation board. It is believed that there is necessity for the

board to function immediately. I therefore ask unanimous consent, as in executive session, that the Secretary be directed to notify the President of the confirmation of the nominations to which I have referred.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the Secretary is authorized to notify the President of the confirmation of the nominations.

. . . . . .

(5) February 3, 1932—Cong. Rec., p. 3415.

The Chief Clerk read the nomination of Wilson McCarthy, of Utah, to be a member of the board of directors of the Reconstruction Finance Corporation for a term of two years from January 22, 1932.

The PRESIDENT pro tempore. Without objection the nomination is confirmed.

MR. KING. Mr. President, the board is now in session and has been for several days, except for Mr. McCarthy, who has not been a member heretofore. In view of the situation and the exigency of the case I ask that the President be notified.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and the President will be notified.

. . . . . .

(6) February 5, 1932—Cong. Rec., p. 3582.

The VICE PRESIDENT. The question is on confirming the nomination. (Putting the question.) The ayes have it, and the nomination is confirmed.

MR. REED. Mr. President, as is obvious to the Members of the Senate, there is an automatic change taking place in the board of directors of the Recon-

struction Finance Corporation, Mr. Mellon going off the board and Mr. Mills, if he is appointed, taking his place, and the new Under Secretary, whoever he may be, going on as a member ex officio.

I am well aware of the settled policy of the Senate regarding notifying the President in advance of the period available for reconsideration; but for the reasons stated by the Senator from Arkansas (Mr. Robinson) the other day in expediting the notice of the confirmation of members of the board of the Reconstruction Finance Corporation, I ask unanimous consent that the President may now be notified of the confirmation of Mr. Mellon.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the President will be notified that the Senate advises and consents to the nomination.

. . . . . .

(7) On February 10, 1932, when Messrs. Mills and Ballantine were confirmed, objection was made to the immediate notification of the President. (Cong. Rec., p. 3782), but on February 11, 1932 (Cong. Rec., p. 3881), the following proceedings took place:

NOTIFICATION OF THE PRESIDENT.

MR. SMOOT. Mr. President, on yesterday I asked unanimous consent that the President be notified of the advice and consent of the Senate to the nominations of Ogden L. Mills to be Secretary of the Treasury and Arthur A. Ballantine to be Under Secretary of the Treasury. At the time the Senator from Nebraska (Mr. Norris) objected. I have been promised by him that if I would bring up the matter today he would have no further objection to the request. I therefore renew my request that the President be notified of the advice and consent of the Senate to the nominations referred to.

The VICE PRESIDENT. Is there objection?

MR. NORRIS. Mr. President, the Senator from Utah came to see me today about my objection made on yesterday. I understand it is desirable that these gentlemen be installed in their respective offices in order that there may be no interference with a prearranged high-class social function. Of course, I do not want to interfere with anything of that nature, so I withdraw my objection.

The VICE PRESIDENT. Without objection, the President will be notified that the Senate advises and consents to the nominations.

. . . . . .

(8) On February 17, 1932, Mr. Grew was confirmed as Ambassador at Tokio, but no order to notify the President was made. On February 24, 1932, the next day of actual executive session, the following proceedings are recorded (Cong. Rec., p. 4724):

NOTICE OF CONFIRMATION OF AMBASSADOR TO JAPAN.

MR. BORAH. A few days ago the Senate confirmed the nomination of Joseph C. Grew, to be ambassador extraordinary and plenipotentiary to Japan. Since that time we have not had an executive session. I desire to ask, as in executive session, that the President be notified of the confirmation.

The VICE PRESIDENT. In the absence of objection, it will be so ordered, and the President will be notified.

. . . . . .

In the above instances the importance of filling at once the offices in question appears as part of the record. Realizing the exigency of the situation in each cited case, the Senate took uniform action. Such action was taken with the avowed purpose of enabling the President to appoint,

and the appointee to hold office at once. In each case it is obvious that the Senate intended to part with control and leave the Executive free to make an immediate appointment. To effect this purpose the Senate took the very same proceedings that it did in the instant case.

IN EACH CASE, AS IN THE CASE AT BAR, A UNANIMOUS CONSENT ORDER WAS MADE THAT THE SECRETARY OF THE SENATE NOTIFY THE PRESIDENT FORTHWITH, AND IN EACH CASE, AS IN THE CASE AT BAR, AFTER THE ORDER WAS MADE, THE PRESIDING OFFICER OF THE SENATE ANNOUNCED THAT THE PRESIDENT "WILL BE NOTIFIED".

Relying strongly on these precedents, the appellee submits that, when the Senate unanimously ordered that the President be notified concerning the confirmation of the appellee, it intended to part with control over the transaction and leave the President free to make a constitutional appointment without further delay.

FOLD-OUT IS TOO LARGE TO BE FILMED